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No. 05-1651

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAY E. ORZECHOWSKI

Petitioner,

v.

YORK INTERNATIONAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT YORK INTERNATIONAL CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTINA HENAGEN PEER
(*Counsel of Record*)
WM. MICHAEL HANNA
SQUIRE, SANDERS & DEMPSEY LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 479-8500
Fax: (216) 479-8780

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Sixth Circuit heightened the evidentiary requirements to survive summary judgment on disability discrimination claims under § 4112.02 of the Ohio Revised Code by (1) requiring a plaintiff alleging a substantial limitation of the major life activity of working to present evidence that he is precluded from a broad range or class of jobs or (2) by requiring a plaintiff alleging a disability due to a "record of impairment" to present evidence of a substantial limitation of a major life activity.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent YORK International Corporation states that it is a wholly owned subsidiary of Johnson Controls International which is publicly traded on the New York Stock Exchange as JCI.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254. This case was decided by the Sixth Circuit Court of Appeals based on diversity jurisdiction and does not raise a federal question. Rather, the Sixth Circuit's application of federal law principles to a state statute is at issue.

STATUTORY PROVISIONS INVOLVED

In addition to § 4112.02 of the Ohio Revised Code, cited by Petitioner, 42 U.S.C. § 12102(2), and 29 C.F.R. § 1630.2 are germane to this matter.

INTRODUCTION

Because this case involves the consistent and correct application of well-settled law, it is a textbook example of a matter that does not warrant this Court's review. Throughout this litigation, Petitioner has repeatedly failed to present evidence that he is disabled within the meaning of § 4112.02 of the Ohio Revised Code. Now, in a last-ditch attempt to salvage his case, he asserts the Sixth Circuit utilized an inappropriate evidentiary standard in reviewing the district court's decision to grant Respondent's motion for summary judgment. However, in requiring that he demonstrate a substantial limitation of the major life activity of working by presenting evidence that he was

precluded from a broad range or class of jobs, the Sixth Circuit and the district court adhered to well-settled and consistently applied principles established by this Court.

Petitioner's argument that this requirement created a circuit split is without merit. First, while the Sixth Circuit applied Americans with Disabilities Act ("ADA") principles, this case was not brought under the ADA. Rather, Petitioner's claim was brought and decided under Ohio law. Second, the Sixth Circuit's application of ADA principles and Equal Employment Opportunity Commission ("EEOC") regulations which require a showing of preclusion from a broad range or class of jobs to Petitioner's state law claims did not create a split between the First and Third Circuits and the Sixth Circuit. Rather, a review of applicable case law demonstrates the First, Third and Sixth Circuits uniformly apply these principles and regulations. Likewise, contrary to Petitioner's claims, the First, Third and Sixth Circuits all require evidence of a substantial limitation of a major life activity to demonstrate a disability due to a "record of impairment."

For these reasons, this Court should deny the Petition.

STATEMENT OF THE CASE

Respondent employed Petitioner at its Valley View, Ohio facility as a warehouseman. Pet. App. 16a. His duties included preparing UPS and Airborne packages, coordinating inbound freight, pulling orders from trucks, customer pickups, imputing orders, answering customer questions and minor maintenance. *Id.* On August 25, 1999, Petitioner injured his back while at work. *Id.* Despite his

injury, he continued to work his regular duties and hours until approximately October 8, 1999, when his doctor diagnosed a herniated disk and indicated he could not work. *Id.* Petitioner returned to work on approximately October 25, 1999 and worked through October 27, 1999. *Id.* Petitioner was placed on leave and did not return to work after this time.[1] *Id.*

Respondent's leave policy allows an employee to take up to twelve consecutive months of leave. Pet. App. 17a. If an employee's leave extends beyond the twelve months allowed by the policy, the employee's employment is terminated. *Id.* On October 18, 2000, Petitioner was advised that, because he would be absent from work for twelve consecutive months as of October 28, 2000, he would be receiving a termination letter. *Id.* In accordance with its leave policy, Respondent terminated Petitioner's employment effective October 31, 2000.[2] Pet. App. 18a.

On July 8, 2002, almost two years after his termination, Petitioner contacted Respondent seeking part-time work through the Part-Time Work Incentive Program administered by Aetna, Respondent's third-party insurance

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[1] On October 28, 1999, Respondent placed Petitioner on leave under the Family and Medical Leave Act. Pet. App. 16a. Petitioner initially received eight weeks of salary continuation and later short-term disability benefits. *Id.* In February 2000, Petitioner had back surgery. *Id.* Petitioner began receiving long-term disability benefits on May 1, 2000. *Id.*

[2] Petitioner alleges he attempted to return to work in August 2000 by inquiring about part-time employment. Pet. App. 17a. Petitioner was informed that no part-time positions were available. *Id.* However, even had a position been available, because he had not been released by his doctor to return to work, Petitioner could not have been hired. Pet. App. 30a.

carrier. Pet. App. 18a. Under this program, an individual who is medically released to work may work part-time with ***any employer*** and continue to receive long-term disability benefits. *Id.*

Respondent informed Petitioner that, although he could work part-time for any employer, part-time employment with Respondent was possible under certain circumstances. Pet. App. 18a. To be considered for a part-time position with Respondent, Petitioner was advised he must be medically released to return to work and a part-time position had to be available. *Id.* Petitioner was medically released to work on July 11, 2002. Pet. App. 30a. However, because no part-time positions were available, Respondent did not re-hire Petitioner.[3] Pet. App. 18a. Since October 2002, Petitioner has worked as a projectionist at a movie theater. Pet. App. 28a.

On October 25, 2002, Petitioner filed a Complaint in the Cuyahoga County Court of Common Pleas which asserted claims for breach of contract, promissory estoppel, violation of good faith and fair dealing, intentional and negligent infliction of emotional distress, discharge in violation of public policy and handicap discrimination in violation of Ohio Revised Code § 4112.02.[4] Respondent removed the case to the United States District Court for

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[3] The lack of part-time positions was not surprising as no part-time positions were available during Petitioner's ten-year employment with Respondent. Pet. App. 23a.

[4] As the docket in this matter is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of it. FED. R. EVID. 201(b)(2). In the interest of brevity, Respondent will not continue to recite the text of the rule each time it cites to the docket of this case but instead will merely cite to the judicial notice rule.

the Northern District of Ohio based on diversity of citizenship.[5] The district court granted Respondent's motion to dismiss Petitioner's claims of promissory estoppel, intentional and negligent infliction of emotional distress and violation of good faith and fair dealing.[6] Petitioner's claims for breach of contract, discharge in violation of public policy and disability discrimination survived dismissal.

Petitioner claimed to be disabled within the meaning of Ohio Revised Code § 4112.02 due to a substantial limitation of the major life activity of working.[7] Pet. App. 26a. Petitioner asserted his back condition limited his ability to do repetitive work because he needed to "sit down for a little while" and "stand up for a little while" and needed to keep moving. *Id.* Dr. James Faremouth opined Petitioner could not perform a job involving repetitive bending from the waist to the floor or a job that involved heavy lifting of more than twenty pounds on a regular or occasional basis. Pet. App. 27a.

After the completion of discovery, Respondent filed a motion for summary judgment on the remaining claims.[8] On December 3, 2004, the Magistrate Judge entered a Report and Recommendation recommending that Respondent's motion for summary judgment be granted. Pet. App. D. The Magistrate Judge found Petitioner's evidence, as cited above, to be insufficient to raise a genuine issue of material fact regarding whether he was disabled due to a

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[5] FED. R. EVID. 201(b)(2).

[6] FED. R. EVID. 201(b)(2).

[7] As Petitioner's other causes of action are not at issue here, the basis of these claims will not be discussed.

[8] FED. R. EVID. 201(b)(2).

substantial limitation of the major life activity of working. Pet. App. 28a. The district court adopted the Magistrate Judge's Report and Recommendation in its entirety on February 3, 2005. Pet. App. B; Pet. App. C. Petitioner timely appealed the decision to the United States Court of Appeals for the Sixth Circuit.[9] After briefing and oral argument, the Sixth Circuit affirmed the decision of the district court. Pet. App. A. This Petition followed.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT SPLIT ALLEGED BY PETITIONER DOES NOT EXIST.

This Court should reject the Petition because the "split" alleged by Petitioner does not exist. Contrary to Petitioner's arguments, the Sixth Circuit does not require an individual alleging a substantial limitation of the major life activity of working to produce more evidence to survive summary judgment than is required in the First and Third Circuits. Rather, consistent with other circuits, the Sixth Circuit merely requires such a plaintiff to present evidence that would allow a reasonable jury to find that he cannot perform a class of jobs or a broad range of jobs in various classes. Similarly, in line with the First and Third Circuits, the Sixth Circuit requires an individual claiming a disability due to a "record of impairment" to demonstrate both a "record" of the impairment and that the impairment "substantially limits a major life activity." Thus, Petitioner's assertion that a circuit split exists is erroneous.

[9] FED. R. EVID. 201(b)(2).

Further, Petitioner did not allege discrimination based on a "record of impairment" with the district court, nor did he argue on appeal that the district court somehow erred in not addressing this issue. Pet. App. A; Pet. App. D. Rather, as the Sixth Circuit noted, Petitioner did not cite any legal error on the part of the district court. Pet. App. 8a. Therefore, Petitioner should not be given the opportunity to seek review based on an alleged "circuit split" regarding an issue that he never raised.

A. This Court Has Defined The Term "Substantially Limits" In Relation To The Major Life Activity Of Working As Being Precluded From A Class Of Jobs Or Broad Range Of Jobs In Various Classes.

The fundamental premise of Petitioner's argument in support of *certiorari* is flawed. In fact, this Court has defined the term "substantially limits" as it applies to the major life activity of working. In *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 491 (1999), when addressing the major life activity of working, this Court stated that the statutory phrase " 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." This Court then explained:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of

> different types of jobs are available, one is not precluded from a broad range of jobs.

Id. at 492.

This definition comports with the regulations promulgated by the EEOC. In its regulations, the EEOC defines "substantially limits" in the context of the major life activity of working as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes compared to the average person having comparable training, skills or abilities." 29 C.F.R. § 1630.2(j)(3)(i). The EEOC further notes that the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id. See also Murphy v. UPS*, 527 U.S. 516 (1999) (assuming, without deciding, the validity of the EEOC regulation). Thus, this Court has provided ample guidance regarding the definition of "substantially limits" as it applies to the major life activity of working.

B. The First, Third And Sixth Circuits Uniformly Apply This Court's Definition Of "Substantially Limits."

Not only has this Court clearly defined "substantially limits," the First, Third and Sixth Circuits all consistently adhere to this definition, requiring an ADA plaintiff alleging a substantial limitation of the major life activity of working to present evidence that he or she is precluded from a class or broad range of jobs in various classes to survive summary judgment. *See Tice v. Centre Area Trans. Auth.*, 247 F.3d 506 (3d Cir. 2001) (holding a plaintiff's inability to drive a bus did not preclude him from a broad class of jobs as necessary to demonstrate a substantial

limitation of the major life activity of working because evidence demonstrated the plaintiff's ability to engage in other employment); *Lebron-Torres v. Whitehall Labs.*, 251 F.3d 236 (1st Cir. 2001) (finding a plaintiff with a back injury did not demonstrate a substantial limitation on the major life activity of working because she continued to work full-time at her manufacturing job after her injury and later almost full-time as a hairstylist); *McKay v. Toyota Motor Mfg., Inc.*, 110 F.3d 369 (6th Cir. 1997) (holding the plaintiff did not produce sufficient evidence to survive summary judgment because evidence only demonstrated her inability to perform a narrow range of jobs requiring repetitive motion, not a broad class of jobs). Thus, Petitioner's alleged circuit split regarding the "substantially limits" definition is nonexistent.

C. The Cases Cited By Petitioner Do Not Evidence A Circuit Split.

Although Petitioner alleges the absence of a definition of "substantial limitation" with respect to the major life activity of working has created a circuit split, he does not set forth any cases supporting this proposition.

i. The First Circuit Cases Cited By Petitioner Are Inapposite And Do Not Evidence A Circuit Split.

The cases relied on by Petitioner to evidence a split of authority between the First and Sixth Circuits are inapposite. First, neither *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999) nor *Lowry v. Cabletron Systems, Inc.*, 973 F. Supp. 77 (D. N.H. 1997), address the First Circuit standard for demonstrating a "record of impairment"

under the ADA. Second, neither *Quint* nor *Lowry* address the evidence necessary to survive summary judgment in the First Circuit as neither case was decided on summary judgment. Rather, in *Quint*, the defendant appealed the district court's finding that it had discriminated against the plaintiff in violation of the ADA. *Quint*, 172 F.3d at 5. In *Lowry*, the district court denied the defendant's motion to dismiss the plaintiff's ADA claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Lowry*, 973 F. Supp. at 84. Thus, neither *Quint* nor *Lowry* support Petitioner's contention that a circuit split exists between the First and Sixth Circuits regarding "record of impairment" or the evidentiary standard required for an ADA plaintiff to survive summary judgment.[10]

ii. The Third Circuit Case Cited By Petitioner Does Not Evidence A Circuit Split.

In support of the contention that a circuit split exists between the Third and Sixth Circuits, Petitioner relies solely on *Whitfield v. Pathmark Stores, Inc.*, 39 F. Supp. 434 (D. Del. 1999). In *Whitfield*, the plaintiff argued she was disabled under the ADA because she had "an impairment that 'substantially limit[ed] one or more of [her] major life activities' or, in the alternative, because she '[had] a record of such impairment.'" *Id.* at 436. The court first addressed whether the impairment substantially

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[10] Interestingly, both *Quint* and *Lowry* utilize the court's holding in *McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) – the Sixth Circuit case Petitioner claims is at the heart of the "circuit split." *Quint*, 172 F.3d at 12-13; *Lowry*, 973 F. Supp. at 81.

limited one or more of the plaintiff's major life activities.[11] *Id.* Regarding the major life activity of working, the court applied the EEOC definition of "substantial limitation" and found that evidence from the plaintiff's vocational expert that her job options were "greatly diminished," was sufficient to survive summary judgment. *Id.* at 440-43, *citing* 29 C.F.R. § 1630.2(j)(3).

The court next considered whether the plaintiff had presented sufficient evidence of a "record of impairment" to survive summary judgment. *Id.* at 444. In concluding that sufficient evidence existed, the court relied on two factors: (1) evidence the defendant knew the plaintiff's medical restrictions were permanent when it began its allegedly discriminatory treatment and (2) the court's previous finding that the restrictions caused by the plaintiff's physical impairment could substantially limit a major life activity. *Id.* at 444-45. Thus, the court also allowed the "record of impairment" claim to proceed to trial. *Id.*

Although Petitioner asserts that comparing *Whitfield* to *McKay v. Toyota Motor Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) evidences a circuit split, the basis for this assertion is unclear. In *McKay*, like *Whitfield*, there was no dispute regarding the existence of a physical impairment. *Id.* at 371. Rather, the district court in *McKay* granted the defendant's motion for summary judgment as it concluded that the plaintiff's carpal tunnel syndrome did not substantially limit the major life activity of working. *Id.* The district court noted that "a diagnosis of carpal

[11] It was uncontested that the plaintiff's back injury constituted a "physical impairment." *Id.* at 436.

tunnel syndrome, by itself, [is] insufficient to raise a genuine issue of material fact concerning whether plaintiff was disabled within the contemplation of the ADA." *Id.* Unlike *Whitfield*, the *McKay* plaintiff did not set forth sufficient evidence of a "substantial limitation of the major life activity of working" to raise an issue of material fact. *Id.* The Sixth Circuit, utilizing the same EEOC regulations as the *Whitfield* Court, affirmed this decision. *Id.* at 371-73. Because the *McKay* plaintiff did not allege discrimination based on a "record of impairment", the court did not address the issue. Thus, comparing *Whitfield* to *McKay* does not evidence a circuit split.

D. Courts In Other Circuits Do Not Allow Plaintiffs Who Merely Establish A Physical Impairment To Proceed To Trial.

Petitioner erroneously asserts that, in "the First and Third Circuit Court of Appeals, plaintiffs who are able to establish physical impairments are able to proceed to trial in the district courts."[12] Pet. at 5. This statement runs contrary to this Court's well-settled precedent. In *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), this Court found:

> It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those 'claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the

[12] As previously noted, Petitioner has waived any "record of impairment" argument by failing to raise this issue with the district court or Sixth Circuit.

> limitation [caused] by their impairment' in terms of their own experience.

Id. at 198, *quoting Alberson's, Inc. v. Kirkingburg*, 527 U.S. 555, 567 (1999). Petitioner also asserts that, in the First and Third Circuits, ADA claims will survive summary judgment if the plaintiff produces evidence that he or she has a "record of disability." Pet. at 4-5. However, none of the cases cited by Petitioner support this proposition. Rather, as discussed below, a review of case law shows courts in the First and Third Circuits do not allow cases to proceed to trial simply because an individual has presented records documenting a "physical impairment."

E. The First, Third And Sixth Circuits Utilize The Same Test When Reviewing "Record Of Impairment" Claims.

Petitioner's assertion of a circuit split regarding the evidence required to survive summary judgment on a "record of impairment" claim is based on a misreading of *Whitfield*. Petitioner seems to assert that a "record of impairment," standing alone, is evidence that will allow an ADA plaintiff to survive summary judgment. This assertion is contrary to the ADA which defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of ***such an impairment*** [an impairment that substantially limits one or more of the major life activities]; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (emphasis added). Under the plain language of the statute, it is insufficient to demonstrate a "record of impairment"; rather, the individual must also demonstrate that the impairment in the record substantially limits a major life activity.

The EEOC further amplifies this point in its regulations which state that an individual has a "record of impairment" when he or she "has a history of, or has been misclassified as having, a mental or physical impairment that ***substantially limits one or more major life activities***." 29 C.F.R. § 1630.2(k) (emphasis added). As these regulations make clear, the recorded impairment must be one that substantially limits a major life activity.

Contrary to Petitioner's assertion, the First, Third and Sixth Circuits all apply the statute and regulations in this manner. In *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506 (3rd Cir. 2001), the court examined a claim based on the "record of disability" prong of the ADA and stated:

> In the alternative, Tice submits that he has a "record of disability" based on his back injuries. This contention fails for the same reason that we hold Tice is not currently disabled. ***A plaintiff attempting to prove the existence of a "record" of disability must still demonstrate that the recorded impairment is a "disability" within the meaning of the ADA.*** Tice has only presented evidence that his impairment limited his ability to drive a bus – ***once again, because an impairment that limits only bus driving is not a "disability," Tice has not demonstrated the existence of a record of disability***.

Id. at 513 (emphasis added). *See also Farkas v. Carpenter Technology Corp.*, Civil Action No. 05-CV-2741, 2006 U.S. Dist. LEXIS 9170 (E.D. Pa. March 6, 2006) (unpublished) (holding the plaintiff's record of having suffered a stroke insufficient to establish a "record of impairment" as there was no evidence his ability to work was substantially limited).

Similarly, in *Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 33 (1st Cir. 2000), the court held the plaintiff failed to establish a "record of impairment" because there was no evidence of an impairment that substantially limited a major life activity. Likewise, in *Sebest v. Campbell City Sch. Dist. Bd. Of Educ.*, 94 Fed. Appx. 320, 327 (6th Cir. 2004) (unpublished), the court held the plaintiff did not establish a "record of impairment." As in this case, the *Sebest* plaintiff proceeded under a misinterpretation of the requirements to demonstrate a "record of impairment." The court noted:

> While Sebest has presented evidence to show that he has suffered from leukemia in the past, he has not presented evidence demonstrating that he has a record of an impairment that substantially limits a major life activity. Sebest appears to assume that by having leukemia, he necessarily has a record of a disability. This understanding, however, is in conflict with the language of the ADA.

Id. See also Olds v. UPS, Inc., 127 Fed. Appx. 779 (6th Cir. 2005) (unpublished) (holding plaintiff did not establish a record of impairment because there was no evidence of a substantial limitation of the major life activity of working). Thus, there is no evidence to support Petitioner's contention that a circuit split exists with respect to this issue.

II. PETITIONER FAILED TO PRESENT EVIDENCE SUFFICIENT TO OVERCOME RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Petitioner's claims failed because he did not present evidence of a substantial limitation of the major life activity of working – not because of an illusory circuit split or error on the part of the Sixth Circuit. As previously noted, to survive summary judgment, an ADA plaintiff must present evidence demonstrating a substantial limitation of a major life activity. When the major life activity is working, a plaintiff must demonstrate that he was precluded from occupying a class or broad range of jobs in various classes as compared to the average person with similar skills, training and abilities. 29 C.F.R. § 1630.2(j)(3)(i). Unless such a showing is made, summary judgment is appropriate. FED. R. CIV. PRO. 56(C).

Here, Petitioner alleged a substantial limitation of the major life activity of working based entirely on: (1) Dr. Faremouth's diagnosis of chronic lumbar radiculopathy – post surgical therapy lumbar spine which limited his ability to bend repeatedly from the waist or regularly lift more than twenty pounds; and (2) his own testimony that due to his back injury, he needs to "sit down for a little while" and "stand up for a little while" and needs to keep moving. Pet. App. 26a-27a. Unlike the situation in *Whitfield*, *Quint* and *Lowry*, Petitioner did not present any evidence in the form of expert testimony or otherwise that he was precluded from a class of jobs or broad range of jobs in various classes. Indeed, Petitioner has been employed since shortly after being medically released to return to work. Pet. App. 28a. Thus, the district court did not err in granting Respondent's motion for summary judgment. In upholding the district court, the Sixth Circuit noted that

Petitioner did not "cite any legal error in the district court's determination, nor [did] he allege that there [were] disputed issues of fact." Pet. App. 8a. Thus, the outcome of this Petition will not alter the disposition of this case.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTINA HENAGEN PEER
(*Counsel of Record*)
WM. MICHAEL HANNA
SQUIRE, SANDERS & DEMPSEY LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 479-8500
Fax: (216) 479-8780

July 28, 2006

APPENDIX A

DAVID FARKAS v. CARPENTER TECHNOLOGY CORP.

CIVIL ACTION, NO. 05-CV-2741

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2006 U.S. Dist. LEXIS 9170;
17 Am. Disabilities Cas. (BNA) 1831

March 8, 2006, Decided
March 8, 2006, Filed; March 9, 2006, Entered

COUNSEL: For DAVID FARKAS, Plaintiff: DONALD P. RUSSO, DONALD P. RUSSO, ESQUIRE, BETHLEHEM, PA.

For CARPENTER TECHNOLOGY CORPORATION, Defendant: JOSEPH P. HOFMANN, STEVENS & LEE, LANCASTER, PA.

JUDGES: R. Barclay Surrick, Judge.

OPINION BY: R. Barclay Surrick

OPINION:

MEMORANDUM & ORDER

SURRICK, J.

March 8, 2006.

Presently before the Court is Defendant's Motion For Summary Judgment (Doc. No. 7). For the following reasons, Defendant's Motion will be granted.

I. BACKGROUND

A. Facts

Plaintiff David Farkas worked as a metallurgist for Defendant Carpenter Technology Corporation ("Carpenter") since 1982. On May 28, 2001, Plaintiff suffered a stroke, which caused him to be hospitalized for approximately one week. Plaintiff then applied for and was granted leave under the Family and Medical Leave Act ("FMLA"). He returned to work on July 5, 2001. At first, Plaintiff's physician restricted Plaintiff's work schedule to three days per week, to be spent in the office only and not in the steel mill. On August 22, 2001, his physician increased his work schedule to four days per week. Plaintiff was permitted to work with these restrictions. On October 12, 2001, Plaintiff's physician lifted all restrictions on Plaintiff's work schedule. From October 12, 2001 until his termination on November 17, 2003, Plaintiff was able to perform his job at Carpenter without restriction.

In his 2002 and 2003 annual performance reviews, Plaintiff received criticisms related to his job performance. (Farkas Dep. at Exs. 11-12.) Some of these criticisms were similar to criticisms that Plaintiff had received in his 1998, 1999, and 2000 performance reviews – reviews that Plaintiff had received before he suffered the stroke. These criticisms included concerns about his leadership skills, accountability, time management, and prioritizing. (Farkas Dep. at Exs. 8-10.) In October 2003, Plaintiff's immediate supervisor, John McGraw (hereinafter "McGraw"), had a meeting with Plaintiff regarding McGraw's concerns about Plaintiff's failure to complete ongoing projects in a timely fashion. (McGraw Dep. at 70-77; Farkas Dep. at 100-02; *id.* at Ex. 14.) At this meeting, Plaintiff indicated to McGraw that he did not want to stay in his current

position with Carpenter and that he wanted to be transferred to a less stressful job. (McGraw Dep. at 70-76; Farkas Dep. at 100-02.) Shortly after this meeting, McGraw discovered that Plaintiff had committed a significant error with regard to a product that Carpenter was manufacturing for Mercury Marine, one of Carpenter's major customers. (McGraw Dep. at 82-86.) This error caused the Defendant great concern related to keeping the client. It also cost Defendant approximately $18,000 to remedy the error. (*Id* . at 83-85; McElwee Dep. at 60-62.) Citing Plaintiff's declining job performance, failure to improve on noted deficiencies, and the aforementioned error with Mercury Marine, Carpenter terminated Plaintiff's employment on November 17, 2003. (Farkas Dep. at Ex. 15.)

B. Procedural History

On July 26, 2004, Plaintiff filed an administrative claim of discrimination with the Equal Employment Opportunity Commission ("EEOC") and with the Pennsylvania Human Relations

Commission ("PHRC").[1] On February 9, 2005, the EEOC sent Plaintiff a Dismissal and Notice of Right to

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[1] Plaintiff's complaint filed with the EEOC stated as follows:

> I began my employment with Carpenter Technology Corporation as a Associate Metallurgist, on 7/01/82, and have progressed to the level as a Senior Metallurgist. My annual reviews were mostly very favorable and I enjoyed my work. On May 28, 2001, I had suffered with a major medical condition which caused me to be out of work for a few days. I had a full recovery and returned back to work after approximately three months and I told John McGraw, Supervisor, that I was not limited in performing any aspects

(Continued on following page)

Sue letter advising that it was closing his file and advising Plaintiff of his right to sue. (Compl., Doc. No. 1 at Ex. B.)

In May 2005, Plaintiff filed suit in the Court of Common Pleas of Lehigh County, alleging that Defendant violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 *et seq.* (Doc. No. 1 ¶¶ 16-18.) On June 7, 2005, Defendant filed a Notice of Removal in this Court. (*Id.*) Defendant has filed the instant Motion requesting summary judgment on both of Plaintiff's claims.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists

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> of my job. I gradually worked more and more hours upon my return to work until I was able to resume full time employment around December 2001. I noticed that my annual performance were lower after my illness, yet nothing was ever noted which caused me to have concerns about my employment, yet on November 17, 2003, John McGraw terminated me due to "performance concerns." No warnings (written or verbal) were ever given to me regarding poor performance prior to my termination. I strongly believe that the company perceived my condition as a financial risk and this was the real reason for my termination.
>
> I believe that I have been discriminated against because of my medical condition in violation of the Americans with Disabilities Act (ADA).

(Farkas Dep. at Ex. 16.)

only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the nonmoving party's legal position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (explaining that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). "The nonmoving party . . . 'cannot rely merely upon bare assertions, conclusory allegations or suspicion' to support its claim." *Townes v. City of Philadelphia*, Civ. A. No. 00-CV-138, 2001 U.S. Dist. LEXIS 6056, at *4 (E.D. Pa. May 11, 2001) (quoting *Fireman's Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995). However, we will not resolve factual disputes or make credibility determinations. *Siegel Transfer, Inc.*, 54 F.3d at 1127.

III. LEGAL ANALYSIS

Title I of the ADA prohibits discrimination by certain private employers against individuals with disabilities. Specifically, it provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In order to make out a prima facie case under the ADA, a plaintiff must demonstrate: "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of ~~the job, with~~ or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998). Under the Act, a "disability" is defined as: "~~(A) a phys~~ical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment." 42 U.S.C. § 12102. Defendant contends that Plaintiff has failed to establish a prima facie case because Plaintiff has not established that he has a disability under any of the ADA's definitions.

A. Impairment That Substantially Limits a Major Life Activity

"It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002). The ADA requires that a

plaintiff must also offer evidence that the extent of the limitation caused by their impairment is substantial. *Id.* Plaintiff argues that his disability is his 2001 stroke, and that the stroke substantially limited his ability to work, a major life activity. (Pl.'s Mem. in Opp., Doc. No. 11 at 32.)

The Code of Federal Regulations specifically provides that to be disabled because of a substantial limitation on the major life activity of working, a plaintiff must be:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). When Plaintiff requested FMLA leave immediately after his stroke, Defendant granted his request. (Farkas Dep. at 33.) In addition, Plaintiff admitted in his deposition that on October 12, 2001, when he returned to a full five-day work schedule, he was able to perform all the functions of his metallurgist position. (*Id.*) Indeed, according to Plaintiff's Complaint, he made a "full recovery" upon his return to work. (Doc. No. 1 ¶ 9.) The only evidence of any kind that Plaintiff offers to demonstrate that his stroke substantially limited his ability to perform "either a class of jobs or a broad range of jobs" are the negative performance evaluations submitted by Plaintiff's supervisor after Plaintiff's stroke. (Doc. No. 11 at 32.) According to Plaintiff, these negative reviews clearly demonstrate "that Farkas' ability to work was impacted by his stroke." (*Id.*)

As an initial matter, we note that Plaintiff's own testimony undermines this argument, since he has disputed the accuracy of these very reviews. (Farkas Dep. at 70-99.) More importantly, these performance evaluations do not indicate that Plaintiff was limited in his ability to perform a class of jobs, let alone *substantially* limited. In the 2002 and 2003 evaluations, Plaintiff's supervisor indicated that he did not believe that Plaintiff had demonstrated enough leadership qualities, that he had time management problems, that he did not take responsibility for work, and that he was indecisive. (Farkas Dep. Exs. 11, 12.) There is no evidence that Plaintiff was unable to perform his job. This conclusion is underscored by Plaintiff's testimony that he was, in fact, able to carry out the essential functions of his position. In his deposition, Plaintiff admitted that only after he was terminated did he believe that his stroke had affected his ability to perform his job. (Farkas Dep. at 124-25, 127-28, 132-33.) After a thorough review of the record, we are satisfied that Plaintiff has failed to demonstrate that his stroke substantially limited his ability to work. Plaintiff went back to work shortly after his stroke and performed his job without limitation. *See Hill v. Steven Motors, Inc.*, 97 Fed. App'x 267, 276 (10th Cir. 2004) (plaintiff did not suffer substantial limitations on her ability to work after her stroke, despite having to undergo a "relearning process" and occasionally losing her balance); *Mitchell v. Girl Scouts of the U.S.A.*, 2003 U.S. Dist. LEXIS 20570, No. 98-CV-3730, 2003 WL 22705121, at *6-7 (S.D.N.Y. Nov. 17, 2003) (plaintiff's contentions that after her stroke she was unable to do a "substantial amount of walking," clean, or ride a bike did not meet criteria for disability under the ADA). Moreover, the deficiencies noted in his reviews existed both before and after his stroke. Accordingly,

Plaintiff has failed to establish that he suffers from a disability as that term is used in the ADA.

B. Record of Disability

Plaintiff has also failed to demonstrate that he has a record of having a disability. "Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). Plaintiff contends that "Defendant had compiled a substantial record" of Plaintiff's disability, and that this record was well-known by Defendant. (Doc. No. 11 at 34.) It is undisputed that Defendant was aware that Plaintiff had a stroke. However, this alone is not sufficient to satisfy the requirements of the ADA. "A plaintiff attempting to prove the existence of a 'record' of disability still must demonstrate that the recorded impairment is a 'disability' within the meaning of the ADA." *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 513 (3d Cir. 2001). As discussed above, Plaintiff has not demonstrated that his stroke is a disability under the ADA because he has offered no proof that his ability to work was substantially limited. *See, e.g., Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1087 (10th Cir. 1999) (plaintiff did not meet standard for "record of disability" where plaintiff's hospitalization affected her for only a brief period and did not impact her ability to perform her job, because she did not suffer an impairment that substantially limits a major life activity).

Similarly, Plaintiff has offered no evidence that Defendant "misclassified" him as having an impairment that substantially limited his ability to work. Although Defendant was aware that Plaintiff had been hospitalized

for a stroke and subsequently granted his request for FMLA leave, there is no indication in the record that Plaintiff's supervisors believed him to be incapable of working. Plaintiff's own doctor lifted all restrictions on his work schedule in October 2001. After that, Plaintiff himself indicated that he had made a full recovery. He also testified that after October 2001, he did not need, nor did he request, a reasonable accommodation on account of his stroke. (Farkas Dep. at 33, 133.) Plaintiff's argument that Defendant misclassified him as disabled has no basis in fact.

Plaintiff attempts to use McGraw's statements in an October 27, 2003 memo to establish a "record" of disability. In that memo, McGraw refers to a discussion he had had with Plaintiff in which Plaintiff indicated that he wanted a less stressful position at Defendant. McGraw notes that "based on Dave's state of mind and the cited affect [sic] on his health together with his lack of performance in this position over the past several years, we should consider removing Dave from this position as soon as possible." (Farkas Dep. at Ex. 14.) Plaintiff's reliance on this statement is at best misguided and at worst, intentionally misleading. The health effects referenced in the memo are the stress-related issues that Plaintiff discussed with McGraw.[2] (Farkas Dep. at 111-12.) Plaintiff admits that he did not think these issues were related to his stroke, and that he did not tell McGraw that they were related to his

[2] Although Plaintiff does not make this argument, we also note that these stress-related health issues – "irregular heartbeat and chronic hemorrhoids" (Farkas Dep. at 111-12) – do not independently satisfy the ADA's definition of a disability, because there is no evidence that they substantially limited his ability to work. *See* 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(j)(3)(i).

stroke. (Farkas Dep. at 111-14.) Without any evidence that Defendant had classified him as having a disability that substantially limited his work, Plaintiff has failed to satisfy the "record of such impairment" test.

C. "Regarded As" Disability

In order to prove that a defendant regarded a plaintiff as disabled, the plaintiff must prove that: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). Defendant contends that there is no evidence indicating that Defendant believed he had an impairment that substantially limited his life activities. While Plaintiff argues that Defendant was aware that he had been hospitalized for a stroke, the Third Circuit has observed that "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action." *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996). Plaintiff also claims that "Defendant considered Farkas as being unable to perform a wide range of jobs." (Doc. No. 11 at 35.) However, Plaintiff offers no support for this contention. To the extent that Plaintiff is suggesting that the fact that Defendant terminated Plaintiff's employment is evidence that Defendant considered Farkas unable to perform a wide range of jobs, this argument is circular in its reasoning and therefore unhelpful. *See Zalepa v. Cornerstone Tech., LLC*, 2005 U.S. Dist. LEXIS

34246, No. CV 03-1850, 2005 WL 3234314, at *7 (M.D. Pa. Nov. 30, 2005) ("The notion that defendant must have fired plaintiff because it regarded him as disabled and that it plainly regarded him as disabled because it fired him is attractive but circular – it lacks a causal antecedent.") (internal citations omitted).

Plaintiff relies on the Third Circuit's opinion in *Taylor v. Pathmark Stores*, 177 F.3d 180 (3d Cir. 1999), for the proposition that "in general, an employer's perception that an employee cannot perform a wide range of jobs suffices to make out a 'regarded as' claim." *Id.* at 188. However, in *Taylor* there was actual written evidence that the employer did not believe the plaintiff could perform *any* job for the employer even with accommodation, and as a result of this perception the employer terminated the plaintiff. *Id.* at 188. There is no such evidence in this case, nor does Plaintiff provide any evidence that his termination was due to such a misperception. The other cases cited by Plaintiff are distinguishable as well, in that those cases involve fact patterns in which the employer drastically restricted plaintiff's employment *as a result of* the employer's belief that plaintiff was unable to perform a range of jobs. *See, e.g., Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751 (3d Cir. 2004); *Best v. Shell Oil Co.*, 107 F.3d 544 (7th Cir. 1997); *Dacasin v. Bay Area Rapid Transit Dist.*, 1998 U.S. Dist. LEXIS 18626, No. C 97-0455, 1998 WL 827697 (N.D. Cal. Nov. 23, 1998). As previously discussed, the only restrictions that Defendant placed on Plaintiff's work as a result of his stroke were those requested by Plaintiff or Plaintiff's physician. After Plaintiff's physician indicated that Plaintiff could work full-time, there is no indication that Defendant regarded

Plaintiff as unable to perform a wide range of jobs.[3] Moreover, Plaintiff himself insisted that he had made a full recovery after his stroke. Under the circumstances, there is no support for Plaintiff's argument under the "regarded as" test for disability.

D. Nondiscriminatory Reasons

Even if one were to somehow conclude that Plaintiff has established a prime facie case of discrimination, one could not reasonably conclude that Defendant's proffered nondiscriminatory reasons for their actions were pretext for discrimination. Plaintiff's reviews over the years, even before his stroke, showed deficiencies in his performance. Although Defendant was satisfied with Plaintiff's job performance and generally considered him a good employee, the deficiencies were never really remedied by Plaintiff. Then, in 2003, Plaintiff made an error which could have cost Defendant a client and did cost Defendant $18,000 to remedy. This coupled with Plaintiff's lack of progress in his job performance and Plaintiff's expressed dissatisfaction with his job provide a nondiscriminatory explanation for Plaintiff's termination.[4] Plaintiff has

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[3] Plaintiff's allegation that Defendant took away his responsibilities for fuel injection customers because of his stroke does not meet the standard under the "regarded as" test. (*See* Doc. No. 14 at 3; Farkas Dep. at 38-40.) The fact that Defendant removed Plaintiff from that one particular job does not establish that Defendant regarded Plaintiff's stroke as substantially limiting his ability to work at a broad class of jobs. Indeed, Plaintiff's compensation and benefits were not affected by the transfer of these responsibilities, and Plaintiff still had a "full plate" of duties without the fuel injection job. (Farkas Dep. at 38-40.)

[4] It is worth noting that in 2001 and 2002, Defendant went through a downsizing in which forty percent of its salaried employees were terminated. This included at least three people who were under

(Continued on following page)

failed to offer evidence of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" to rebut Defendant's nondiscriminatory reasons. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994). The fact that Defendant's reasons may have been wrong, or mistaken, or demonstrated a complete lack of loyalty to an employee of over twenty years service does not render the employer's reasons pretextual. *See id.* ("To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.").

E. PHRA Claim

We similarly conclude that Plaintiff has not provided sufficient evidence of a disability under the PHRA. The PHRA definition of disability is nearly identical to that of the ADA: "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment. . . . " 43 Pa. Cons. Stat. § 954(p.1). "The PHRA is basically the same as the ADA in relevant respects and 'Pennsylvania courts . . . generally interpret the PHRA in accord with its federal counterparts.'" *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382 (3d Cir. 2002) (citing *Kelly*, 94 F.3d at 105). Therefore, we will grant Defendant's Motion with respect to Plaintiff's PHRA claim also.

McGraw's supervision. Plaintiff's responsibilities increased as a result of the downsizing.

IV. CONCLUSION

Plaintiff has not met his burden to establish a prima facie case under the ADA or the PHRA. He has failed to provide evidence demonstrating that he has a disability as defined by these statutes. He has also failed to establish that Defendant's reasons for terminating him were pretextual. Accordingly, we will grant Defendant's Motion for Summary Judgment.

An appropriate Order follows.

ORDER

AND NOW, this 8th day of March, 2006, upon consideration of Defendant's Motion For Summary Judgment, it is ORDERED that Defendant's Motion is GRANTED, and judgement is entered in favor of Defendant Carpenter Technology Corp. and against Plaintiff David Farkas.

IT IS SO ORDERED.

BY THE COURT:

S/ R. Barclay Surrick, Judge

APPENDIX B

MARX OLDS, Plaintiff-Appellant v. UNITED PARCEL SERVICE, INC., Defendant-Appellee

No. 03-1920

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

127 Fed. Appx. 779; 2005 U.S. App. LEXIS 5501

April 1, 2005, Filed

COUNSEL: For MARK OLDS, Plaintiff-Appellant: Mary Katherine Norton, Detroit, MI; Steven A. Hicks, Knaggs, Harter, Brake & Schneider, Lansing, MI

For UNITED PARCEL SERVICE, INC., Defendant-Appellee: Kathleen McCree Lewis, Dykema Gossett, Detroit, MI; Stephen S. Muhich, Kelley E. Stonnels, Dykema Gossett, Grand Rapids, MI

JUDGES: BEFORE: NORRIS, BATCHELDER AND ROGERS, Circuit Judges.

OPINION:

PER CURIAM. Plaintiff Mark Olds appeals from the district court's grant of summary judgment in favor of defendant United Parcel Service, Inc. ("UPS"), in this disability discrimination action under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 ("ADA").[1]

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[1] The district court also granted summary judgment is favor of UPS on Olds' claims for retaliation in violation of the ADA and the Michigan Workers Disability Compensation Act. On appeal, Olds does not challenge the decision to grant UPS summary judgment on those claims.

I.

The district court set forth the facts of the case in an opinion granting summary judgment to UPS:

> Plaintiff Mark Olds worked as a package delivery driver for Defendant United Parcel Service, Inc. ("UPS") at its St. Joseph, Michigan facility from September 1982 until January 8, 1998.
>
> Plaintiff is 52 years old, married, and has three children. He has a high school education and an associate's degree in business. Prior to beginning employment with Defendant, Plaintiff worked at various manual labor jobs including welding, machining auto parts, construction, and carpentry. All parties agree Plaintiff had an excellent employment record while with UPS.
>
> In 1997, Plaintiff was diagnosed with monoclonal gammopathy of undetermined significance, a condition involving an abnormal protein that leads to cancer 20 percent of the time. This diagnosis had no impact on Plaintiff's ability to work. After sustaining a compression fracture in his neck while on the job in January 1998, Defendant was diagnosed with multiple myeloma, a cancer affecting bone marrow. Plaintiff went on short-term disability after sustaining this injury. After undergoing chemotherapy, Plaintiff sought to return to work in May 1998 pursuant to his doctor's approval. Plaintiff was initially under a 25 pound lifting restriction and precluded from doing any kind of repetitive bending or twisting. This was later increased to a 40 pound restriction in January 1999, and the lifting restriction was made permanent in September 1999. Plaintiff was also instructed not to perform certain repetitive activities that might put sudden, excessive

force on his bones. Plaintiff underwent a bone marrow transplant in September 2002. He was cleared to work in January 2003, still under a 40 pound lifting restriction.

Plaintiff first inquired about accommodation for his weight restriction in February 1999 and formally sought accommodation in September 1999. Plaintiff sought permission to use a two-wheel dolly to deliver packages over 40 pounds in weight. In October 1999, Plaintiff submitted a written request for Defendant to make this accommodation available to him.[1] Defendant denied Plaintiff's request for accommodation on the basis that it did not find him entitled to one under the Americans with Disabilities Act of 1990 ("ADA"). Defendant also informed Plaintiff he was not qualified to return to work because of his lifting restriction. Plaintiff filed a grievance with respect to Defendant's refusal to let him return to work under a 40 pound lifting restriction. The grievance was appealed to a state panel which upheld UPS's decision as not being in violation of the collective bargaining contract. The panel did not address whether Defendant should provide Plaintiff with any accommodation or whether other positions were available.

After being denied the opportunity to return to his old job as a package delivery driver, Plaintiff bid on a number of openings at the St. Joseph facility, including delivery driver positions, a customer clerk opening, a porter position, and an air shuttle driver job. His application for each was denied on the ground that he was unable to perform the essential job function of being able to lift over 40 pounds regardless of his seniority.

Plaintiff is currently collecting Social Security Disability benefits, for which he applied in January 1998, pursuant to his diagnosis. Immediately after sustaining his injury, Plaintiff also filed a worker's compensation claim that Defendant initially denied. Subsequently, in May 1999, upon review by a Magistrate Judge, Plaintiff was awarded worker's compensation benefits for a closed period from January to October 1998, the time during which Plaintiff's compression fracture was healing. In June 2000, Plaintiff filed a charge of discrimination with the Michigan Department of Civil Rights, which, as far as the Court can determine from the record, recommended referral of the case to conciliation.

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[1] Defendant instructs its drivers to use a two-wheel dolly when delivering packages over 70 pounds and places no restriction on a driver's decision to use a dolly for lesser weight packages. Defendant also recommends use of a dolly when delivering multiple packages and/or envelopes to one location regardless of their individual or cumulative weight. The Court also notes, drivers are allotted a certain amount of time in which to complete their routes based on time studies periodically conducted by Defendant. Use of a dolly generally increases the allotted delivery time by approximately 15 seconds. Such an allotment is granted to account for the time needed to deliver packages over 70 pounds with a dolly.

Opinion, June 17, 2003 at 1-3 (footnote in original).

The district court granted summary judgment to defendant because it found that plaintiff was not disabled as defined by the ADA. The court held that Olds did not suffer from an impairment that substantially limited a

major life activity because "a lifting restriction alone does not constitute a disability." Opinion, June 17, 2003, at 5. The court also concluded that Olds was not substantially limited in a major life activity because he did not demonstrate a significant restriction on his ability to obtain employment in a broad range of jobs. In the same vein, the court determined that Olds did not suffer from a record of impairment that substantially limited a major life activity: "At no time, based on the record before the Court, has Plaintiff's physical impairment substantially limited one or more of his major life activities." Opinion, June 17, 2003, at 11. Finally, the district court held that Olds did not suffer from being regarded as having an impairment that substantially limited a major life activity. It determined that UPS did not permit Olds to return to work because of his lifting restriction, and that Olds did not raise a question of fact with respect to whether UPS entertained a misperception about him.

II.

This court reviews a grant of summary judgment *de novo. Motorists Mut. Ins. Co. v. Hammond,* 355 F.3d 593, 596 (6th Cir. 2004). Summary judgment must be granted pursuant to Fed. R. Civ. P. 56(c) if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. All evidence and inferences must be construed in the light most favorable to the non-moving party. *Shah v. Deaconess Hosp.,* 355 F.3d 496, 498 (6th Cir. 2004).

To state a claim under the ADA, a plaintiff must demonstrate:

> (1) that she is a disabled person within the meaning of the Act, (2) that she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) that she suffered an adverse employment decision because of her disability.

McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369, 371 (6th Cir. 1997). The parties do not dispute that Olds suffered an adverse employment action, but do contest the other two elements of the test.

"Disability" under the ADA means:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). A plaintiff who claims that he is disabled because a condition substantially limits his ability to engage in the "major life activity" of working must show that he is "significantly restricted in [his] ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person with comparable training, skills and abilities." *McKay,* 110 F.3d at 371. (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Olds accordingly can survive summary judgment if he can demonstrate that he was subject to any one of these three conditions and that he was restricted in his ability to work in a "class of jobs" or a "broad range of jobs in various classes." *Id.* However, the "inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

We agree with the district court that Olds is not so physically impaired that he is disabled as defined by the ADA. Olds argues that he has a physical impairment, cancer, which creates a weight restriction that substantially limits a major life activity: his ability to work. However, as the district court correctly concluded, the general rule in this circuit is that a weight restriction alone is not considered a disability under the ADA. Opinion, June 17, 2003, at 5-7 (citing *Gayer v. Cont'l Airlines,* 21 Fed.Appx. 347 (6th Cir. 2001) (unpublished)); *see also McKay,* 110 F.3d at 373 (holding that plaintiff's inability to lift more than ten pounds would not significantly restrict her ability to perform a broad range of jobs in various classes). Olds' lifting restriction prevents him from working as a delivery driver and from performing other jobs at UPS specifically, but there is no evidence in the record that it prevents him from engaging in a broad class of jobs.

Similarly, Olds has not raised a genuine issue of material fact that he has a "record of impairment." "A record of an impairment means an individual has 'a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.'" *MX Group, Inc. v. City of Covington,* 293 F.3d 326, 339 (6th Cir. 2002); (citing 28 C.F.R. § 35.104(3)). The district court determined that Olds' physical impairments limited his ability to meet his job requirements, but did not limit one or more major life activities. We agree with the district court for the same reasons that led us to conclude that Olds was not disabled as defined by the ADA.

That said, we depart from the decision in one respect: we hold that Olds has raised a genuine issue of material

fact about whether UPS regarded him as having an impairment. To succeed in demonstrating that he is "regarded as having . . . an impairment," a plaintiff must show the following:

> (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Ross v. Campbell Soup Co., 237 F.3d 701, 706 (6th Cir. 2001) (citing *Sutton v. United Air Lines*, 527 U.S. 471, 489, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999)). The district court concluded that there was no evidence to indicate that UPS discriminated against Olds based upon a misperception; rather, it concluded that UPS refused him employment based upon an accurate understanding of his limitations – that he could not lift 40 pounds.

However, a former UPS employee testified that a UPS corporate lawyer said that Olds should not be reinstated because he had cancer. Furthermore, the former employee testified that UPS did not want to accommodate Olds because it did not want to rehire him: "we didn't want to come right out and say that because of Mark's condition, his cancerous condition, that he couldn't do the job." The same employee also indicated that UPS changed the lifting requirements of certain positions to avoid accommodating

Olds. A reasonable jury could infer that UPS believed that Olds' condition was significantly more disabling than it actually was, and for that reason UPS did not want to reinstate him. Olds has accordingly raised a genuine issue of material fact as to whether UPS regarded him as having an impairment.

Because the district court determined that Olds was not disabled as defined by the ADA, it did not reach the question of whether he was qualified to perform the essential functions of his job. UPS argues that Olds cannot perform the task of lifting up to 70 pounds without assistance, a task defined by UPS as essential. Olds suggests that the weight-lifting requirements are arbitrary because they were changed without regard to job duties to make the lifting requirements "uniform" for all jobs at the St. Joseph facility. He also contends that other package delivery drivers with back problems had been given permission to use dolly carts and request customer assistance for limited periods of time. Accordingly, on remand, the district court will need to determine what the "essential functions" of UPS jobs are and whether Olds reasonably can perform them with an accommodation.

UPS argues that Olds is precluded from demonstrating that he is qualified because an administrative law judge found him entitled to Social Security Disability benefits. We disagree. Under the Supreme Court's decision in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 807, 143 L. Ed. 2d 966, 119 S. Ct. 1597 (1999), Olds is required to give a "sufficient explanation" as to how he can perform the essential functions of the job, given the Social Security Administration's determination of total disability. However, because the Social Security Administration assesses only what a claimant can do, while the relevant inquiry

under the ADA asks what the claimant can do *with or without accommodation,* the only explanation that a plaintiff need provide is that he can perform the work in question *with accommodation.* As stated by the Supreme Court:

> To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement [to the Social Security Administration], the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."

Id. Because Olds has suggested two accommodations, namely, either a transfer to another position, or permission to use the dolly cart and to request customer assistance with packages over 40 pounds, it appears that he can provide a satisfactory "explanation."

III.

The judgment of the district court is **reversed** and the case is **remanded** to the district court for further proceedings consistent with this opinion.

APPENDIX C

JOSEPH M. SEBEST, Plaintiff-Appellee v. CAMPBELL CITY SCHOOL DISTRICT BOARD OF EDUCATION; MICHAEL TSIKOURIS, Defendants-Appellants.

No. 02-4012

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

94 Fed. Appx. 320; 2004 U.S. App. LEXIS 7173

April 8, 2004, Filed

COUNSEL: For JOSPEH M. SEBEST, Plaintiff-Appellant: Eric E. Norton, The Norton Law Firm, Cleveland, OH.

For CAMPBELL CITY SCHOOL DISTRICT BOARD OF EDUCATION, MICHAEL TSIKOURIS, Defendants-Appellees: James E. Roberts, Roth, Blair, Roberts, Strasfeld & Lodge, John C. Pfau, Pfau, Pfau & Marando, Youngstown, OH.

JUDGES: Before: BATCHELDER, GIBBONS, and COOK, Circuit Judges.

OPINION BY: JULIA SMITH GIBBONS

OPINION:

JULIA SMITH GIBBONS, Circuit Judge. Joseph Sebest became treasurer of the Campbell City school district for a probationary term starting in March 1999. Sebest's employment with the school district elapsed on January 11, 2000, when his contract expired, and the Campbell City School District Board of Education (the "Board") offered him a new employment contract that provided for an annual salary approximately $4,000 less than the salary earned by Sebest under his first contract. Sebest rejected the second contract and filed suit in the

United States District Court for the Northern District of Ohio against the school board and one of its members, Michael Tsikouris, for violations of federal and state disability discrimination law. Sebest and the defendants filed cross-motions for summary judgment, and the district court granted summary judgment to the defendants.

On appeal, Sebest challenges the district court's factual assumption that Tsikouris's views on Sebest's health did not influence other members of the school board. Accordingly, Sebest argues that the district court erred in granting summary judgment to the defendants on his disability discrimination claims. Sebest also asserts that the district court erred in deciding that he had not brought suit against Tsikouris in his individual capacity. For the reasons set forth below. we affirm the grant of summary judgment to the Board and Tsikouris.

I.

In the early 1980s, Sebest was diagnosed with chronic myelogenous leukemia.[1] As treatment for his leukemia, he received a bone marrow transplant in 1984. Because of the transplant, Sebest acquired graft-versus-host disease, a condition that affects the lungs. Around 1999, Sebest experienced breathing-related difficulties, such as shortness of breath when he exerted himself, sinus drainage, and sputum production. His treating physician, Dr. Clay Braden Marsh, categorized Sebest's condition in 1999 as severe obstructive pulmonary lung disease and probably a

[1] In a 2002 deposition, Sebest stated that he no longer suffers from leukemia.

combination of bronchiectasis and *bronchiolitis obliterans.*[2] Dr. Marsh testified that during this period Sebest generally could perform daily functions – such as getting up in the morning, brushing his teeth, and driving to work – but that his breathing problems became aggravated by stress or strenuous activity. According to Dr. Marsh's testimony, Sebest's abnormal pulmonary function may prevent him from being able to walk up a flight of stairs "on his bad days."

On March 25, 1999, the Board convened a special meeting to hire a probationary treasurer for the district. At the meeting, board member Bernard Petro remarked that Sebest had suffered from leukemia in the past. Board member Tsikouris asked the other board members if Sebest, who was in attendance for parts of the meeting, looked frail and whether he should be hired since he might not be well. Tsikouris also discussed Sebest's $300 health insurance deductible. In addition, Tsikouris expressed concern that a recurrence of Sebest's illness could be costly to the school district. The other board members declined to discuss these issues, and several members even told Tsikouris that his comments were inappropriate.

Sebest was hired by the Board at an annual salary of $48,000, with three members voting in favor of his hiring and Tsikouris and another board member voting against it. Sebest then entered into a contract with the school board, which stated:

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[2] According to Dr. Marsh, bronchiectasis is abnormal dilation of the lower airways, which can predispose individuals to develop infections in the lung. *Bronchiolitis obliterans* occurs when there has been a small obliteration in the lungs and can be caused by graft-versus-host disease.

> This contract of employment entered into this 25th day of March 1999 by and between the Board of Education of the Campbell City School District, Mahoning County, Ohio, and Joseph M. Sebest hereafter designated as Treasurer.
>
> The said Board of Education, pursuant to motion duly adopted and in accordance with the provisions of Revised Code [§] 3313.22 hereby employs the said Joseph M. Sebest as Treasurer for a one (1) year probationary term beginning on April 6, 1999 through the Organizational Meeting in January of 2000.
>
> The said Board of Education in consideration of the services rendered by the Treasurer, hereby agrees to pay the said Treasurer an annual salary of $48,000.00 as adopted by the Board on March 25, 1999. If a renewal contract is adopted, said annual salary will be negotiated for each year of the contract and may be increased by action of the Board of Education at any time as per Ohio Revised Code [§] 3313.24. That the Treasurer per diem be based on 260 work days and divided into his total annual salary.
>
> The said Treasurer agrees to enter into this contract of employment for the above designated term, and to diligently and faithfully perform his duties as Treasurer in accordance with the law for the above designated term or until such time as his contract may be terminated as prescribed by law.

Sebest served as school district treasurer for the period specified in his contract.

On January 11, 2000, the school board held its organizational meeting – the point at which Sebest's employment under his contract elapsed – and adopted a resolution offering Sebest a two-year probationary contract with compensation and benefits to be determined at a later time. On January 25, the Board adopted another resolution, which set the salary for treasurer at $44,000 and increased the contribution made on Sebest's behalf to the School Employees Retirement System from two percent to five percent of his salary.[3] The resolution also stated that a formal written contract would be prepared at a later date and presented to Sebest, who would then have two weeks to decide whether or not to accept it. On January 31, 2000, the Board presented Sebest with the proposed written contract, which Sebest eventually rejected.

Sebest pursued an ultimately unsuccessful administrative appeal of his dismissal in the Ohio Court of Common Pleas. Sebest then filed suit against the Board and Tsikouris in district court for disability discrimination under the *Americans with Disabilities Act of 1990* ("ADA") and the *Rehabilitation Act of 1973*. Sebest also alleged additional federal and state law claims.[4]

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[3] The Board members suggested the following annual salary figures for Sebest's second contract: $38,000 (Board member Rohan); $42,000 (Board member Tsikouris); $41,000 (Board member Rusnak); $48,000 (Board member Cougras); and $48,000 (Board member Gerlick). The Board eventually decided to offer Sebest a salary of $44,000 by averaging the salary figures provided by each of the five board members.

[4] Sebest's complaint alleged the following claims: violations of Ohio Rev. Code § 4112; breach of contract; violation of 42 U.S.C. § 1983; wrongful discharge in violation of public policy (disability discrimination); wrongful discharge in violation of public policy (Ohio Rev. Code § 3313.22); promissory estoppel; intentional infliction of emotional

(Continued on following page)

Sebest and defendants filed cross-motions for summary judgment. The district court denied Sebest's motion and granted defendants' motion for summary judgment with respect to Sebest's claims under the ADA, the Rehabilitation Act, and wrongful discharge in violation of public policy (disability discrimination).[5] The district court held that "examining all of the evidence in the light most favorable to Sebest, there is nothing on this record to show that the Board discriminated against Sebest on the basis of a real or perceived disability." Sebest appeals the district court's decision.

II.

This court reviews a district court's order granting summary judgment *de novo*. *Laderach v. U-Haul*, 207 F.3d 825, 827 (6th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A dispute over a material fact cannot be 'genuine' unless a reasonable jury could return a verdict for the nonmoving party." *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). In performing this review, we must draw inferences

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distress; and a claim for punitive damages. The district court granted Sebest's motion to dismiss the claims for violation of 42 U.S.C. § 1983, wrongful discharge in violation of public policy (Ohio Rev. Code § 3313.22), and intentional infliction of emotional distress.

[5] The district court also dismissed Sebest's remaining state law claims because these claims "substantially predominate[] over the claim or claims over which the district court has original jurisdiction." *See* 28 U.S.C. § 1367(c)(2).

from the evidence in the light most favorable to the non-moving party. *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 501 (6th Cir. 2003). "Accordingly, summary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Laderach*, 207 F.3d at 828 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

Sebest asserts that there is direct and indirect evidence that the Board discriminated against him because he is disabled. We affirm the district court's conclusion that the record does not support this claim. Specifically, Sebest has failed to present evidence that the *Board* – the decision-maker in this case – made decisions with respect to Sebest's employment based on his disability. Even assuming *arguendo* that the school board did make such decisions, we are unpersuaded that Sebest meets the definition of disability provided in the ADA.

A.

In considering Sebest's discrimination claims, we must first review his challenge to the district court's factual assumption that Tsikouris's discussions about Sebest's health did not influence the decision of other board members to offer Sebest a second employment contract at a lower salary. On this point, the district court stated, "it is clear that the decision-maker/employer, that is, *the Board*, was not influenced by Tsikouris." We review *de novo* a district court's factual assumptions made at the summary judgment stage. *Brennan v. Township of Northville*, 78 F.3d 1152, 1156 (6th Cir. 1996).

We see no reason to disturb the district court's determination that Tsikouris's personal views of Sebest did not direct the decision-making of the five-member Board. Sebest has presented evidence that Tsikouris made statements at the March 25, 1999, school board meeting about Sebest having leukemia. While members serving on the Board at that time testified that Tsikouris asked questions about Sebest's health and his health insurance deductible, Sebest has not presented any evidence that Tsikouris's remarks were shared – or were even considered – by other members of the Board. This conclusion is bolstered by the fact that, after Tsikouris raised the issue of Sebest's health, three board members told Tsikouris that his remarks were inappropriate. Furthermore, at the same meeting that Tsikouris discussed Sebest's health, the Board proceeded to hire Sebest under the first contract. The following year, the Board voted to offer him a second employment contract. In sum, while the record may provide information about Tsikouris's personal views, it does not indicate that a majority of the Board – the only entity able to make decisions about Sebest's employment – supported his opinion.

B.

Even if we construed Tsikouris's comments about Sebest to reflect the opinion of at least a majority of the Board, Sebest has not met his burden of showing that he is disabled under the ADA. To recover on an ADA claim, an individual must establish that he or she was a qualified individual with a disability at the time of the discriminatory act. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 884 (6th Cir. 1996). In the ADA, the term "disability" is defined as, with respect to an individual: "[1] a physical or mental

impairment that substantially limits one or more of the major life activities of such individual; [2] a record of such an impairment; [3] or being regarded as having such an impairment." 42 U.S.C. § 12102(2). Sebest claims that he is disabled under all three definitions.

Sebest first argues that his breathing is substantially limited. Breathing is indeed a "major life activity" for purposes of the ADA, 29 C.F.R. § 1630.2(i), because it is an activity "of central importance to daily life." *See Toyota Motor Mfg. v. Williams,* 534 U.S. 184, 197, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002) (providing definition of "major life activity"). The term "substantially limits" in the definition of disability means

> unable to perform a major life activity that the average person in the general population can perform; or *significantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (emphasis added). In considering whether an individual is substantially limited in a major life activity, the following factors are relevant:

> [1] The nature and severity of the impairment;
>
> [2] The duration or expected duration of the impairment; and
>
> [3] The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

In support of his claim that he is disabled, Sebest points to his affidavit testimony that his physical impairments include shortness of breath and significant difficulty with breathing and that his condition becomes aggravated when he is under stress. Sebest also cites the testimony of Dr. Clay Marsh, who stated that Sebest's condition affects his breathing when Sebest is under stress or has engaged in strenuous activity. Dr. Marsh did not indicate that Sebest's breathing is affected in the absence of these factors. In fact, Dr. Marsh testified that at the time Sebest was hired and served as school district treasurer, Sebest was able to perform normal daily functions – activities such as showering, eating, and driving to work – and was able to complete his job as treasurer. Only during what Dr. Marsh described as Sebest's "bad days" would Sebest encounter difficulty in breathing. The record does not indicate how often Sebest had a "bad day" or the duration of such a period.

This testimony fails to demonstrate that Sebest's condition *substantially* limits his breathing. Clearly Sebest's impairment does not render him unable to breathe. Therefore, for Sebest to demonstrate that his impairment substantially limits his breathing, he must present evidence such that a reasonable jury could find that his impairment significantly restricted the condition or manner of his breathing, as compared to the average person in the population.[6] Looking to the nature and severity of Sebest's impairment, as explained by Sebest's statements and the testimony of Dr. Marsh, we conclude

[6] We note that Sebest has only presented arguments that he is disabled because his impairment interferes with breathing and not because his impairment interferes with any other major life activity.

that Sebest has not presented such evidence. Both Sebest and his treating physician testified that his breathing becomes affected under stress or strenuous conditions. The record lacks any evidence indicating that, when Sebest is not under stress or is not performing a strenuous activity, his breathing is significantly restricted. Therefore, Sebest does not meet the first definition of disability in the ADA. *See Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996) (noting that "several instances of shortness of breath when climbing stairs do not rise to the level of *substantially* limiting the major life activity of breathing"); *Minnix v. City of Chillicothe*, 2000 U.S. App. LEXIS 2099, No. 98-4285, 2000 WL 191828, at *2 (6th Cir. Feb. 10, 2000) (holding that plaintiff failed to present a genuine question of material fact that impairment substantially limited breathing when there was no medical evidence that plaintiff's breathing problems were "severe, long term, or permanent"); *Ventura v. City of Independence*, 1997 U.S. App. LEXIS 4102, No. 95-3582, 1997 WL 94688, at *2 (6th Cir. Mar. 4, 1997) (finding that plaintiff with asthma, which caused him difficulty breathing but did not prevent him from engaging in activities such as walking or playing baseball, was not substantially limited in breathing).[7]

Sebest also argues that he is disabled because he previously suffered from leukemia and leukemia-related

[7] In his brief, Sebest cites *U-Haul Co. v. Kunkle*, an unpublished decision, for the proposition that a plaintiff who experienced breathing problems that occasionally required him to go "out to [his] truck to get oxygen" in order to breathe was disabled under the ADA. 165 F.3d 29, 1998 WL 681253, at *3 (6th Cir. 1998) (alteration in original). Unlike the plaintiff in *Kunkle*, Sebest has not presented evidence that he has ever needed an oxygen tank in order to breathe.

health problems, thereby indicating that he has a record of a disability. While Sebest has presented evidence to show that he has suffered from leukemia in the past, he has not presented evidence demonstrating that he has a record of an impairment that substantially limits a major life activity. Sebest appears to assume that by having leukemia, he necessarily has a record of a disability. This understanding, however, is in conflict with the language of the ADA. An individual is disabled if he or she has a record of a physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g)(2) (incorporating 29 C.F.R. § 1630.2(g)(1)); *see also* 29 C.F.R. § 1630.2(k) (stating that a person is disabled by having a record of an impairment when that person "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities").

Sebest has not provided evidence that the leukemia from which he suffered in the 1980s substantially limited a major life activity. Declaring leukemia a disability *per se* would contravene this court's "statutory obligation to determine the existence of disabilities on a case-by-case basis." *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 566, 144 L. Ed. 2d 518, 119 S. Ct. 2162 (1999). As the Supreme Court has explained, "the [ADA] expresses that mandate clearly by defining 'disability' 'with respect to an individual,' 42 U.S.C. § 12102(2), and in terms of the impact of an impairment on 'such individual,' § 12102(2)(A)." *Id.*; *see also Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 483, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) (noting that "whether a person has a disability under the ADA is an individualized inquiry"); *Bragdon v. Abbott,* 524 U.S. 624, 641-42, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998)

(declining to consider whether HIV is a *per se* disability under the ADA); 29 C.F.R. Pt. 1630, App. § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). Since Sebest has failed to present evidence that he has a record of an impairment that substantially limits a major life activity, he is not disabled under the second definition of disability provided in the ADA.

Finally, Sebest argues that he was "regarded as" having a disability by his employer because of the concerns about Sebest's health expressed by Tsikouris at the March 25, 1999, board meeting. The Supreme Court has stated that there are two ways in which an individual can be regarded as disabled: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 489.

As we previously discussed, decisions about Sebest's employment were made by the five member school board. Besides Tsikouris's comments, Sebest has offered no evidence that the *school board* made decisions regarding Sebest's employment with any consideration of his health condition. Therefore, as Sebest has failed to present evidence that a reasonable jury could find him to be disabled under the definitions of disability provided in the

ADA, we affirm the grant of summary judgment to the defendants.[8]

Because we affirm the grant of summary judgment to the Board and Tsikouris, we do not need to consider whether Sebest sued Tsikouris in his individual or official capacity.

III.

For the foregoing reasons, we affirm the decision of the district court granting summary judgment to the defendants.

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[8] Sebest asserts that he is also protected under Ohio disability discrimination law, Ohio Rev. Code § 4112.02. Our decision on Sebest's ADA claim is also dispositive of his state law disability claim. *Lockard v. Gen. Motors Corp.*, 52 Fed. Appx. 782, 785 n.2 (6th Cir. 2002) ("This court's ruling with respect to [plaintiff's] ADA claim also disposes of her claim of disability discrimination under Ohio law."); *see also City of Columbus Civil Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 1998 Ohio 410, 697 N.E.2d 204, 206-07 (Ohio 1998) ("The federal Americans with Disabilities Act . . . is similar to the Ohio handicap discrimination law. . . . We can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law.").